Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Connect America Fund	)	WC Docket No. 10-90
	)	
A National Broadband Plan for Our Future	)	GN Docket No. 09-51
	)	
Establishing Just and Reasonable Rates for Local Exchange Carriers	)	WC Docket No. 07-135
	)	
	)	
High-Cost Universal Service Support	)	WC Docket No. 05-337
	)	
	)	
Developing an Unified Intercarrier Compensation Regime	)	CC Docket No. 01-92
	)	
	)	
Federal-State Joint Board on Universal Service	)	CC Docket No. 96-45
	)	
Lifeline and Link-Up	)	WC Docket No. 03-109
	)	

COMMENTS OF FREE CONFERENCING CORPORATION

April 1, 2011

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Free Conferencing Corporation ("FreeConferenceCall.com") hereby responds to the *Notice of Proposed Rulemaking* ("*NPRM*") soliciting comment on draft rules developed by the Commission to modernize the Commission's intercarrier compensation ("ICC") system.[1]

I. EXECUTIVE SUMMARY

FreeConferenceCall.com is a provider of toll conference calling to businesses, nonprofits and individuals. In providing toll conference calling services, FreeConferenceCall.com competes with AT&T, Verizon and other large carriers. The only difference in the toll conferencing services that FreeConferenceCall.com provides is that while the more established carriers require customers to pay for (1) each line calling in to the bridge and (2) an organizer fee, which is typically 8.5 to 50 cents per minute, customers using FreeConferenceCall.com only pay for (1) - each line calling in to the bridge.

FreeConference.com recognizes that there have been abuses of the access charge regime by parties that have generated traffic in the form of calls that are not placed by consumers for the consumer's own benefit, but rather are artificially generated for the purpose of generating access charges. Such abusive practices must be curbed, but they should also be distinguished from practices that induce consumers to take the initiative of placing a call for their own benefit--to

[1] *Connect America Fund, A National Broadband Plan for Our Future, Establishing Just and Reasonable Rates for Local Exchange Carriers, High-Cost Universal Service Support, Developing a Unified Intercarrier Compensation System, et al.,* WC Docket Nos. 10-90, 07-135, 05-337, 03-109, GN Docket No. 09-51, CC Dockets No. 01-92, 96-45, FCC 11-13, *Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking* (rel. Feb. 8, 2011) (the "*NPRM*").

confer with business colleagues or friends or relatives. These are precisely the same reasons people have been placing telephone calls since the telephone was invented.

FreeConferenceCall.com also recognizes that a LEC that has established a high access rate based on assumptions of low call volumes and therefore high average costs may experience a reduction in average costs as its call volume increases as the result of access stimulation. It further recognizes that as a matter of policy, it may be inequitable to continue imposing high access charges after the LEC has achieved high volumes of access traffic, and therefore is no longer experiencing high average costs of providing access. FreeConferenceCall.com therefore supports an approach in which carriers with increasing access traffic volumes gradually reduce their access rates until the rates reach RBOC levels when the access traffic volumes reach typical RBOC levels.

FreeConferenceCall.com opposes the Commission's proposed approach of using "revenue sharing" as the sole trigger for a requirement that a LEC refile its tariff. Such a trigger would discriminate against conference calling providers that are not affiliated with a LEC and in favor of conference calling providers, such as AT&T and Verizon, that home their conference calling traffic to an affiliated LEC. By homing their traffic to affiliated LECs, AT&T and Verizon are able to capture all of the access revenue from such calls without triggering the proposed "revenue sharing" definition (or any workable definition of revenue sharing). In addition, revenue sharing does not in and of itself establish that traffic volume has increased, or that a LEC's costs of providing access have decreased.

Because the Commission's expressed concern is that access stimulation in areas with low call volume and therefore relatively high access rates leads to increased volumes, which in turn lead to decreased costs, the problem is one of pricing. The preferred remedy for a pricing problem is a pricing solution. FreeConferenceCall.com proposes a volume-based pricing remedy that has been used in a number of tariffs that the Commission has allowed to go into effect, even over IXC protests and that are working today, in the real world. This remedy, the High Volume Access Tariff ("HVAT"), would be required to be filed by any revenue sharing LEC whose access rates exceed BOC access rates. The HVAT would taper rates down to BOC rates as volume increases, and could be adjusted over time so that rates taper down to BOC rates at lower and lower levels of volume.

The HVAT should be filed on 15 days notice, so as to be deemed lawful, thereby simplifying a LEC's business planning. Deemed lawful status would provide revenue sharing LECs with a strong incentive to comply. If they do not comply, they would run the risk of IXCs refusing to pay and being able to prevail in a collection action, thereby leaving the LEC with no recovery for the services it has rendered. If, on the other hand, the LEC complies by filing an HVAT when required, enforcement would be simplified, since the IXC has an obligation to pay if and only if the LEC adhered to the rates spelled out in its tariff. An HVAT that is "deemed lawful" would reduce disputes and simplify enforcement and litigation, creating stability in the marketplace for further investment, freeing the parties and the FCC to devote their energies to more productive endeavors.

FreeConferenceCall.com opposes the provision in the proposal that would require LECs that meet the revenue sharing trigger to refile tariffs on at least 16 days' notice, thereby eliminating "deemed lawful" status. The rationale in ¶ 666 of the NPRM for this approach, that "whether a LEC has met a proposed access stimulation trigger might not be readily apparent when the tariff is filed," is based on flawed logic. It treats CLECs that have *complied* with the Commission's rules by filing or refiling access tariffs at the rates of the RBOC as though they had violated the rules, and thereby undermines their incentive to comply.. If a CLEC files rates that match the RBOC rates, then it *does not matter whether or not the CLEC has met the access stimulation trigger*. Either way, the CLEC has complied with the Commission's rules and reduced its tariff rate, addressing the FCC's pricing concerns. The tariff should be accorded "deemed lawful" status because whether or not the CLEC has met the proposed access stimulation trigger, the rates comply with the Commission's rules. While it may not be readily apparent whether the CLEC has met the access trigger, it should be readily apparent whether the CLEC has matched the RBOC's access rates and thus the supposed difficulty of determining whether a CLEC has met the access trigger is a red herring. Therefore, it should suffice to deny the benefits of "deemed lawful" treatment *only* for CLECs whose rates exceed the RBOC's rate and that meet the proposed access stimulation trigger.

In this proceeding, the Commission has stated as a goal the promotion of broadband in unserved areas. Through HVATs and by virtue of provision of conference calling without an organizer fee as well as other means of increasing inbound traffic, many rural areas and Native American reservations have been able to bring broadband to their service areas and improve penetration of voice telephony, without any assistance from USF or government subsidies.

Finally, FreeConferenceCall.com asks the Commission to disregard "studies" that purport to measure "harm" that has resulted from access stimulation. None of the "studies" that have been made part of the record meet even the most rudimentary standards for disclosure of the data, inputs, and methodology on which they are based. They therefore do not provide a sound foundation on which the Commission can base policy decisions. Moreover, those few assumptions that appear in fact to have been disclosed are unreasonable and undermine the credibility of the “studies.” For example, without any support, the “studies” totally inappropriately assume that absent the conference calling without an organizer fee offered by FreeConferenceCall.com and others like it, those access minutes would disappear, rather than being shifted to conference calls on networks of other providers such as AT&T and Verizon or other two-way or three-way calls.

II. ABOUT FREECONFERENCECALL.COM

FreeConferenceCall.com provides conferencing and conference calling services for businesses, individuals, nonprofits, government, and other organizations in the United States and internationally. With about 20 million active callers a month, the company's FreeConferenceCall flagship solution offers a high-quality, reservation-less conferencing service that is used to connect over 200 million calls a year. Unlike many other competitive offerings from toll and toll-free audio conferencing services that use analog-based conference bridges that can be prone to static and other noise, FreeConferenceCall's network is built on higher quality digital voice technology.

FreeConferenceCall.com was founded in 2001 and is based in Long Beach, California. The “free” in FreeConferenceCall refers to the absence of organizer fees or per line charges assessed by many toll and toll-free conferencing providers. Many of FreeConferenceCall.com’s customers migrated from providers (mostly IXC subsidiaries or partners) who charge organizer fees, per line fees, and/or monthly prepaid arrangements. FreeConferenceCall.com offers domestic audio conferencing, international audio conferencing, event conferencing, flat-rate conferencing, toll-free conferencing, outgoing call messaging, online conferencing, and voicemail messaging services.

A major milestone for FreeConferenceCall.com took place during the 2008 Presidential Election, when both President Obama and Senator McCain's campaigns chose FreeConferenceCall.com to communicate with their supporters nationwide (utilizing over 1,000 accounts and over 5,000,000 minutes of conferencing). In fact, according to TeleSpan, free conference calls are growing at five times the rate of domestic (organizer fee/per line charge) conference calls.

Unlike other pure VoIP-based services, FreeConferenceCall.com uses both the PSTN and high definition VoIP to deliver high-quality audio conferencing services, and can handle a call size of up to 1,000 callers without a reservation. FreeConferenceCall.com's average user during a given year uses approximately 28 minutes per month, and the average call lasts 31 minutes and has 5 participants.

From urban to rural areas (including Native American reservations) consumers across the country are using FreeConferenceCall.com's services to connect to other people. Audio conference, voice mail, domestic all forwarding and other similar services are nongeographic and do not need to be clustered in urban hubs. Indeed, the use of FreeConferenceCall.com's services has encouraged economic development in rural areas and on tribal lands as the money that local exchange carriers generate from traffic on their networks allows those carriers to invest in building out their networks with no Federal financial support. The FCC has pointed out that pricing in rural areas is a concern and pricing can be addressed without closing the door on further development. Investment in new infrastructure that can be used, for example, to deploy broadband through rural or tribal lands represents a proven means of achieving Congress's stated goals of promoting civic participation, community development, education, worker training, entrepreneurial activity, job creation and economic growth on tribal lands, as well as closing the broadband gap in tribal areas as recognized in the Commission's National Broadband Plan.[2] Further information about FreeConferenceCall.com is provided in an addendum.

III. HOW TOLL CONFERENCE CALLING WORKS

Toll conferencing, whether offered by an IXC, such as AT&T or Verizon Business Services, both of which have been offering the service for years, or by an entity like FreeConferenceCall.com that offers toll conferencing without an organizer fee, works exactly the same way. The conferencing company host establishes a conference bridge with a LEC. The conferencing company hosts a website and/or customer service center in order to distribute conference credentials (dial-in number and access code) for the bridge. The conference organizer receives a toll dial-in number and access code from the website or customer service center hosted by conferencing service provider. The conference organizer invites others to the call by distributing the dial-in number and access code generated by the conferencing company with a time and date for other participants to join the conference call. The conference organizer and other participants call in to the dial-in number using their long distance service at the designated time.

The LEC hosting the conferencing company bridge terminates the incoming calls of the organizer and other participants at its switch and routes the calls to the conferencing company bridge on premises. The conferencing company bridge connects the calls of the organizer and

[2] *See, e.g.*, Letter from Ross A. Buntrock, Counsel to Native American Telecom *et al.*, to Marlene Dortch, Secretary, Federal Communications Commission, Docket Nos. 09-47 *et al*., at 1 (dated April 16, 2010).

the other participants based on the access codes entered by the organizer and other participants. The LEC switch calculates the minutes used and separates them based on the long distance services used by the organizer and other participants. The LEC bills the appropriate long distance service providers the tariffed switched access rate based on each participant's time on the call. The long distance carriers pay the LEC for access service received by the long distance carrier from the LEC and the long distance company bills its customer for carrying the call to the conference bridge just as with any customer call.

Toll conferencing clearly offers benefits to customers. By enabling multiple participants to converse in a single call, it saves the consumer the cost and inconvenience of "daisy chaining" all participants or holding multiple 2-way calls.[3] AT&T and Verizon Business each offer the service and charge organizer fees. For example, Verizon Business offers packages of *prepaid* toll conferencing with organizer fees ranging from 11 cents per minute to 16 cents per minute, depending on the number of minutes per month that are needed.[4] In a call to Verizon ((800)201-1453) on March 31, 2011, FreeConferenceCall.Com was quoted a single call rate of 26 cents per minute per participant for toll conferencing and 50 cents per participant per minute for toll free conferencing,

AT&T offers pay as you go conferencing at a rate of 8.5 cents per minute per participant,[5] and touts as benefits that "Audio conferencing can be a productive, cost-effective

[3] Ironically, absent conference calling, customers might substitute with multiple two-way and daisy chain calls and as a result generate more minutes subject to access charges for the IXCs that serve them.

[4] https://conferencing.verizonbusiness.com/smb/services/audio_conference.jsp. (last accessed March 31, 2011).

[5] https://trial.uc.att.com/portal/?Guid=26b2ca0f-2c55-4081-9086-136002d9e2e9;07858079-72F0-46F1-9460-BAFE7CDA84A4 (last accessed March 31, 2011).

alternative to in-person meetings, training sessions and presentations."[6] Customers would not pay these fees unless they derived benefits from toll conferencing. These organizer fees are the only difference between the conference calling offered by FreeConferenceCall.com on the one hand and AT&T and Verizon, on the other. Thus, "free" conference calling is free only of organizer fees. The same is true of "free" 3-way calling offered by many LECs and wireless companies as part of a package. In both cases, the calls to reach the bridge are subject to the charges of the IXCs or other carriers carrying those calls.

The record of WC Docket No. 07-135 contains letters from a wide variety of business and charitable organizations, explaining how they have used free conferencing in their business and charitable activities. For example, the National Sales Director for Mary Kay Cosmetics points out that her "sales team uses a free conferencing service almost every day."[7] The CEO of the Direct Women's Selling Alliance filed comments stating that because of free conferencing, "[w]e are now able to save time and money by speaking to many people at once. I cannot imagine going back to the antiquated system that existed before free conferencing services. It would devastate all businesses like ours that depend upon the telephone to be able to reach their entire team at once."[8] The Chief Information Officer for the United States Western Territory of the Salvation Army stated that: "Free conferencing services have allowed us to greatly reduce our costs. We used to pay 8 cents per person per minute for conference calls using our former

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[6] *See* Exhibit A.

[7] *Ex parte* letter of Connie Kittson, National Sales Director, Mary Kay Cosmetics, WC Docket 07-135 (October 20, 2010) at 1.

[8] *Ex parte* letter of Nicki Keohohou, CEO and Co-Founder, Direct Women's Selling Alliance, WC Docket No. 07-135 (November 3, 2010).

provider. Now, we pay approximately 1.9 cents per minute under our current plan. Free conferencing services are responsible for saving The Salvation Army approximately $10,000 per month."[9]

The main difference between the toll conferencing offered by FreeConferenceCall.com, on the one hand, and AT&T and Verizon Business Services, on the other, is that while in both cases, participants have to pay for their own long distance service to reach the bridge, AT&T[10] and Verizon Business Services also charge organizer fees, while FreeConferenceCall.com does not. These differences result from the election of different business models by different participants in the conference calling market, just as some carriers offer voicemail at no additional charge, while other carriers assess an additional charge for voicemail. There is nothing inherent to the structure of telecommunications that requires that a conference call provider impose an organizer fee.

A. Usage by FreeConferenceCall.com customers

As noted above, usage of toll conferencing services by FreeConferenceCall.com customers in a given year averages 28 minutes per month and is dependent on each individual customer's determination as to whether to initiate or participate in conference calls using FreeConferenceCall.com's services.. The average call lasts 31 minutes and has 5 participants. While AT&T, Verizon, Qwest and Sprint have not offered information as to their customers' average usage, we suspect it is similar. FreeConferenceCall.com customers are not abusing or

[9] *Ex parte* letter of Clarence White, Chief Information Officer, for the Western United States territory of the salvation Army, Docket No. 07-135 (November 9, 2010) at 1.

[10] AT&T, one of the most vocal opponents of "free" conferencing, also offers "free" conference calling. *See* Attachment to *ex parte* letter of Jeff Holoubek Director of Legal & Finance, Free Conferencing Corp., WC Docket Nos. 07-135 and 01-92 (January 31, 2011), at p. 8. AT&T's offer is for 30 days only of free conferencing, but there appears to be nothing to stop customers from signing up again and again.

overusing this service. No evidence has been offered that more or longer conference calls have taken place because of FreeConferenceCall.com's offer of a toll conferencing service without an organizer fee than would have taken place absent such an offer. Indeed, FreeConferenceCall.com's customers have no incentive to do anything other than conduct the business for which they placed the call and move on, just as do conferencing customers of AT&T, Verizon, Qwest and Sprint. Toll conferencing is always based on the customer's needs and initiative, regardless of the service provider chosen.

IV. "ACCESS STIMULATION" MUST BE DISTINGUISHED FROM "TRAFFIC PUMPING"

While IXCs have indiscriminately referred to anything that stimulates additional long distance calling by the pejorative term of "traffic pumping," it is important to distinguish between (1) increased volumes of calls placed by bona fide consumers of telephone service for personal reasons apart from generating access revenue and (2) calls not placed by consumers that are placed for the purpose of generating access revenue. The former category would include calls placed by consumers to inbound call centers, consumer dialed conference calls, as well as consumer calls to voice mail, consumer use of domestic all forwarding features, and consumer calls to information service providers.

By contrast, an example of the latter category of calls (not dialed by consumers) is Sprint Nextel's description of calls between RLECs that are coordinated so that they "last for hours at a time, and/or are autodialed in 60.6 minute blocks for over 22 hours of traffic per day."[11] This category of calls is appropriately referred to as "traffic pumping," an abusive practice that should

[11] Comments of Sprint Nextel Corp., WC Docket No. 07-135 (December 17, 2007) at 5.

be prohibited. Another example of the latter category of calls is purchase of long distance service where the buyer pays less for the long distance service than the IXC pays in terminating access fees and the buyer collects some portion of the terminating access fees. FreeConferenceCall.com described this practice in its *ex parte* presentation of January 31, 2011 in WC Docket Nos. 07-135 and 01-92.

The NPRM defines "access stimulation" as "an arbitrage scheme employed to take advantage of intercarrier compensation rates by generating elevated traffic volumes to maximize revenues."[12] This definition is flawed in a number of respects. First, any offering that induces people to call a given telephone number will generate "elevated traffic volumes" and thereby increase access revenues. Second, while any increase in traffic volumes will increase revenues, no offering will "maximize revenues" unless the highest available access rates are charged. Third, the reference to a "scheme employed to take advantage of intercarrier compensation rates" would sweep in any offering that increases traffic volumes. For example, telephone companies have for many decades offered free calls to get weather reports and the current time. They also offer voicemail and domestic all forwarding, which encourage inbound calling. Any offering that stimulates "elevated traffic volumes" is likely to be found to "take advantage of intercarrier compensation rates" because the provision of transport and termination is priced at or above average cost, but entails declining costs, so any rate based on average cost is likely to exceed incremental cost and thereby enable the carrier to "take advantage of intercarrier compensation rates." While this is true of reciprocal compensation, which is priced under the FCC's TELRIC

[12] NPRM. ¶ 636.

methodology at average cost, it is even more true of access charges, which are higher than reciprocal compensation charges but involve the same costs.

Thus, while "traffic pumping" has no redeeming purpose and should be banned, "access stimulation" is like any business practice in which costs are declining and a business desires to reduce its average cost by increasing volume, and is commonly used by carriers that could not reasonably be accused of engaging in "arbitrage." To the extent that there is a legitimate concern regarding this practice, the concern relates to rates, particularly rural rates that exceed costs incurred by carriers that have increased traffic volumes and therefore reduced costs compared to typical rural costs. Significantly, it should be noted that to handle its call volume better, FreeConference Call.com operates in both rural (high rate) and urban (low rate) environments. FreeConferenceCall.com's views on the distinction between traffic pumping and access stimulation are summarized in its *ex parte* presentation of January 31, 2011 in WC Docket Nos. 07-135 and 01-92.

V. ALARMIST CLAIMS OF HARM FROM FREE CONFERENCE CALLING ARE UNFOUNDED

For years, the IXCs and wireless carriers have claimed that they have been harmed by the offering of conference calls without an organizer fee and other offerings that they alleged result in increased long distance traffic. They have argued that they are forced to pay access charges to terminate an increased volume of calls, and have offered "studies" that purport to quantify the amount of harm at enormous 9- and 10-figure amounts.[13] They further argue that because they offer service on a flat rate or "all-you-can eat" basis, the additional calls do not generate revenue

[13] *See* NPRM ¶ 637.

to offset the access charges and other costs that result from the calls, and that as a result, their shareholders and/or their other customers are required to bear part of the cost of the increased calls.[14]

The claim of harm to IXCs and wireless carriers and/or their other customers is predicated on two assumptions: (1) the calls would not have taken place absent FreeConferenceCall.com's offer of toll conference services without an organizer fee and (2) the IXC or wireless carrier derives no revenue from the call. Both of these assumptions are unfounded. Moreover, the IXCs and wireless carriers have available at their disposal a number of tactics that they can use and have used to eliminate or minimize any harm.

A. Evidence has not been offered to show that the offering of conference calls without an organizer fee has increased the volume of conference calls

We are not aware of any record evidence in the purported studies of alleged "harm" done by those offering conference calls without organizer fees or elsewhere that establishes that an appreciable portion of the calls that FreeConferenceCall.com and others like it carry would not have taken place absent the offer of toll conference services without an organizer fee. To the contrary, FreeConferenceCall.com believes that the vast majority of the calls would have taken place anyway, using a service for which an organizer fee is charged. A typical organizer fee is between 8.5 and 50 cents per minute per line, based on AT&T's and Verizon's offerings.[15] An average conference call provided by FreeConferenceCall.com has 5 parties calling in, so an AT&T or Verizon conference call consumer would pay 5 times these figures the minute the

[14] E.g., Comments of Qwest Communications Int'l Inc., WC Docket No. 07-135 (December 17, 2007) at 11; Reply Comments of AT&T Inc., WC Docket No. 07-135 (January 16, 2008) at 14; Attachment to ex parte letter of Melissa E. Newman, Vice-President, Federal Relations, Qwest (August 5, 2010) at 3.

[15] *See* notes _- and __, *supra*.

conference call began. A FreeConferenceCall.com customer (whether organizer or participant) would only pay their wireline or wireless provider for the cost of their time on the call. For the consumer, it is simply a matter of awareness of the market and price sensitivity, as in any marketplace.

The record in WC Docket No. 07-135 contains evidence that many of the calls without an organizer fee would otherwise have taken place with an organizer fee. For example, the National Sales Director of Mary Kay Cosmetics advised the Commission that "if free conferencing goes away, then the system will revert back to the old days when everyone had to pay an exorbitant fee in order to make a conference call."[16] In other words, the calls won't stop. They will just be terminated on another conference bridge--probably a bridge supplied by one of the IXCs that have been complaining about conference calls without an organizer fee.[17] The IXCs would still have to pay access charges on these conference calls. This suggests that the complaints about FreeConferenceCard.com and other similar conference calling services that do not impose an organizer fee are motivated more by competitive concerns in that IXCs have lost conference calling business than by concerns about paying access charges on increased volumes of conference calling traffic.[18]

[16] *Ex parte* letter of Connie Kittson, National Sales Director, Mary Kay Cosmetics, WC Docket 07-135 (October 20, 2010) at 2.

[17] FreeConferenceCall.com does not contend that every single one of the millions of conference calls it conducts would have taken place if the callers had to pay an organizer fee. It simply contends that *most* of the calls would have taken place even if an organizer fee had to be paid and wishes to point out that the assumptions of IXCs that *none* of the calls would have taken place if an organizer fee were required is unsupported and illogical.

[18] IXCs are also undoubtedly concerned about the level of access charges on conference calls. FreeConferenceCall.com addresses those issues in Section VII, below.

B. The record does not support the claim that IXCs and wireless carriers receive no revenue for any additional calls associated with the offer of conference calling without an organizer fee

The argument that the IXC does not receive revenue from additional calls is based in part on the factually erroneous assumption that all calls are made pursuant to unlimited calling plans and in part on confusion between average revenue and marginal revenue.

1. Many calls to conference bridges generate revenue for the IXC or wireless carrier

There can be no doubt that some of the callers are using long distance or wireless plans that require payment per minute of use. As noted above, FreeConferenceCall.com is heavily used by businesses of all sizes, non-profit organizations, and other non-residential customers who are not likely to have unlimited wireline long distance plans. As Verizon admitted in Comments, more than 25% of wireline customers do not have flat-rate long distance plans and therefore pay "the incremental long-distance charges incurred for dialing into the services."[19] For example, a bill received by a FreeConferenceCall.com customer from AT&T for a call into a FreeConferenceCall.com bridge reflected a 153-minute call, for which AT&T imposed a charge of $45.14, or approximately 30 cents per minute.[20] It is safe to say that terminating access fell well short of $45.14 on this call.

AT&T also offers a long distance plan with a fee of $5 per month plus 5 cents per

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[19] Comments of Verizon in Response to Notice of Proposed Rulemaking, WC Docket 07-135 (December 17, 2007), at 8.

[20] Dr. Alan Pearce & Dr. W. Brian Barrett, "Fact Report: The Economic Impact of Free Conference Calling Services," attachment to *ex parte* letter of Alan Pearce, President, Information Age Economics, WC Docket Nos. 07-135, 09-47, 09-51, 09-137, 09-223 (March 1, 2010) ("Pearce & Barrett Fact Report"), Exhibit B.,

minute, Qwest offers a $1.99 monthly fee plus 15 cents per minute, and Sprint offers a plan at $8.95 per month plus 5 cents per minute.[21] Verizon's e-Values plan charges customers as much as 10 cents per minute for long-distance calls.[22] Another Verizon plan offers 200 minutes of long-distance for $12.99 plus 5 cents per minute for additional minutes.[23]

In addition, many callers are calling from wireless phones, and large percentage of wireless users do not have unlimited plans. For example, Sprint is currently offering wireless plan options that include: (1) 200 minutes for $29.99, plus 45 cents per additional minute; (2) 450 minutes for $39.99, plus 45 cents per additional minute and (3) 900 minutes for $59.99 plus 40 cents per additional minute.[24] Verizon Wireless offers options that match Sprint options (2) and (3). If callers have tiered plans such as these, additional calls caused by "access stimulation" may cause them to exceed their tier limits and pay by the minute—which is a favorable outcome for the wireless company. Indeed, many wireless callers are on prepaid plans,[25] which to our knowledge, are never unlimited and therefore result in revenue to the carrier for each minute.

Moreover, given that many wireline and wireless customers have upgraded either to unlimited long distance plans or to higher tiers on tiered plans (e.g., moving from Sprint option (1) to (2) or (3) or moving from Sprint option (2) to (3)), it is fair to assume that (1) these upgrades resulted in additional revenues to the carriers and (2) any upgrading customers making use of conference calls without organizer fees upgraded in whole or in part in recognition of their

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[21] Pearce & Barrett Fact Report at 19.

[22] *See ex parte* letter, Ross A. Buntrock, Docket No. 07-135 (October 14, 2010) at 2-3.

[23] Pearce & Barrett Fact Report at 19.

[24] *See* Exhibit B. As shown in Exhibit B, Sprint also offers variations that include these tiers of voice minutes, along with text messaging and/or data.

[25] *E.g.*, AT&T's 2010 10-K reports on page 34 that AT&T has 6,524,000 prepaid wireless customers.

use of such services. The wireless companies and IXCs that are opponents of access stimulation have the relevant data about the calling plans subscribed to by users of free conference calling services in their possession; their failure to offer independently confirmed data into the record such as the additional revenues they receive from calls resulting from “access stimulation” warrants an inference that the data would be unfavorable to their thesis.[26]

2. Claims of harm from access stimulation are based on confusion between marginal revenues and average revenues

While the IXCs and wireless carriers claim they have been harmed by the offering of toll conference calling without an organizer fee and other services that they claim stimulate calling, their argument is incorrectly predicated on a purported analysis of marginal costs and marginal revenues. To the extent that they offer flat rate calling plans that have no marginal revenues, they will obviously be worse off as the result of *anything* that results in additional calling, from a telephone company-offered weather report, to a call-in radio show, to Mother’s Day. For example, a recent Sprint commercial shows a family sitting around the dinner table, texting and emailing one another. The mother says, “don’t worry honey, I switched to Sprint so I get unlimited texts . . . it’s OK. Email and web are unlimited, too.”[27] The point that Sprint is clearly making is that when the marginal cost of texting and emailing drops to zero, customers can and will make more use of them. The same is true of any business that offers a fixed price service, from an all-you-can eat restaurant to an amusement park that offers an unlimited season’s pass at

[26] *Cf. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) v. National Labor Relations Board,* 459 F. 2d 1329, 1336 (D.C. Cir. 1972) (“as a product of common sense,” a party’s ” failure to offer relevant evidence within his control . . . gives rise to an inference that the evidence is unfavorable to him,” citing 2 J. Wigmore on Evidence § 285 (3d ed. 1940)).

[27] *See* http://www.youtube.com/watch?v=GgCdMGhBRc0.

a fixed price. They all make more profit from customers that use less of the unlimited goods or services being offered. They all make business decisions based on assumptions about the average volume that flat rated customers will consume, while at the same time--as in the Sprint commercial discussed above--they are encouraging the consumer to increase usage because additional usage is free. When and if those assumptions about volume demanded of the "free" service prove to be underestimated, they may have to adjust their business strategy

The decisions of businesses to offer unlimited plans are of necessity based on total revenues and total costs. Typical IXC and wireless carrier revenues per minute for interstate domestic long distance calls are around 7 cents for landline[28] and 5 cents for wireless.[29] Total profits are, by definition equal to average profits multiplied by the number of customers. If the IXCs and wireless carriers were actually losing money on such plans, they could offer evidence of that fact. Because they have not done so, it should be presumed that they are continuing to earn money on such plans, especially since they continue to promote such plans aggressively.[30] In fact, the major IXCs' rates of return for interstate service have been increasing at least since 2003.[31] Moreover, far from increasing the rates for their unlimited plans, the wireless carriers have been reducing those rates,[32] undermining their claims that they have to pass on additional costs from "ever-increasing" access stimulation to other customers.

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[28] Industry Analysis & Technology Division, Wireline Competition Bureau, FCC, "Telecommunications Industry Revenues - 2008,“ (October 2010), at Table 9; Universal Service Monitoring Report 2010 CC Docket No. 98-202, Prepared by Federal and State Staff for the Federal-State Joint Board on Universal Service in CC Docket No. 96-45, at Table 7.6; Consumer Price Index, Bureau of Labor Statistics, http//www.bls.gov/cpi/#data.

[29] Fourteenth Report, WT Docket 09-66 (May 20, 2010) at ¶ 361.

[30] Pearce & Barrett Fact Report at 14.

[31] Pearce & Barrett Fact Report at 22.

[32] *See* ex parte letter of Ross A. Buntrock, WC Docket No. 07-135 (October 14, 2010) at 5.

C. Claims of harm are predicated on unfounded assumptions regarding causation

Claims of harm resulting from access stimulation are predicated on dubious principles of causation. IXCs and wireless carriers operate on the assumption that their offering of unlimited flat-rate calling is given, and that it is conference calling without an organizer fee that "causes" increased usage. But in fact, any increased conference calling usage is the product of *two* factors, one of which is totally within the control of the IXCs and wireless carriers. The two factors are (1) an attractive product that provides consumers an incentive to place calls, such as conference calling without an organizer fee and (2) unlimited calling plans that encourage customers to make liberal use of their phones. The volume of conference calls without an organizer fee is unquestionably the product of *both* of these factors. Neither one would produce the current volumes without the other. Moreover, it is not at all clear that the volume of minutes subject to access charges would decrease if conference calling without an organizer fee disappeared tomorrow. Some of the calls would move to conference calling services that impose an organizer fee, while others would be handled by daisy chaining through three-way calling or by a series of two-party calls. The end result might be more MOUs of switched access traffic because the alternative to conference calling is not necessarily *not calling at all* but may be sequential calling.[33]

While the NPRM states that "[a]ccess stimulation imposes undue costs on consumers, inefficiently diverting the flow of capital from more productive uses such as broadband

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[33] Depending on rates, the number of access dollars might be increased or decreased. FreeConferenceCall.com addresses access pricing issues in Section VII, below.

deployment,[34] and harms competition,"[35] it is clear that when IXCs and wireless carriers not too long ago decided to start offering unlimited calling plans, they knew that such plans would stimulate more traffic and thus knowingly took on the burden of paying access charges on more minutes of traffic.[36] This was clearly a business decision that they consciously made. The IXCs and wireless carriers offering unlimited calling had to know that once the incremental cost of a call to the end user dropped to zero, their customers would place more calls. This is plain as a matter of the most basic economic principles of supply and demand. As Drs. Pearce & Barrett put it: any increased calling resulting from free conference calling "only becomes a 'problem' for the IXC if the IXC charges a flat monthly rate for unlimited long-distance and local calling."[37]

D. Purported studies of harm from access stimulation are too flawed to be credited

Paragraph 637 of the NPRM identifies projections done by TEOCO, Verizon, and

[34] As discussed in section VII, below, broadband and other technologies were brought to rural South Dakota on two Native American reservations without federal assistance or USF support as the result of access stimulation.

[35] NPRM, ¶ 637. In ¶ 638, the FCC cites as an example for its reference to "harms competition," claims from ZipDX, a conference calling provider. We are unaware of any other conference call provider that is unaffiliated with an RBOC having complained of harms to competition. Moreover, ZipDX's business model, while different from that of FreeConferencecall.com, also stimulates access charges. The complaints of ZipDX are like a website that charges for content complaining that another website offers similar services without charge because its business model depends on revenue from its advertising partners, causing the website that charges for content competitive harm. The fact that a competitor has elected not to avail itself of a potential revenue source is not in itself a basis to limit the revenue source. For example, the FCC is not asking to outlaw organizer fees on conference calls.

[36] FreeConferenceCall.com also disagrees with the assertion that traffic stimulation has diverted funds from broadband. The fact is that increased traffic volumes in rural and tribal areas with pricing based on a high volume access tariff have actually *enabled* LECs in those areas to bring both broadband voice service to their customers where universal service funding did not. Examples of this are discussed in Section VII, below.

[37] Pearce & Barrett Fact Report at 17.

Connectiv Solutions as measuring "impact to the industry of access stimulation." Each of these three projections is so lacking in support and transparency and so riddled with errors and unsupported assumptions as to be completely unworthy of the Commission's reliance. Indeed, none of the studies comes close to the standards for admissibility in a court of law or even under the more liberal standards used in a state PUC cost proceeding. The Commission should place no credence at all in any of the purported studies that seek to quantify the amount of expense associated with access stimulating services.

First, Verizon's "analysis" is completely undocumented. It simply multiplies an asserted 2 billion minutes that it anticipates will be billed to Verizon by an unknown number of unidentified "traffic pumping LECs" by "several cents per minute," concluding that this will result in an "annual impact of traffic pumping to Verizon of $66-$88 million." Thus, Verizon appears to be assuming (without stating any basis) tariffed rates of 3.3 to 4.4 cents per minute <u>and that it is paying these rates</u> (which it is not). It then assumes that overall, there are 10 billion "traffic pumping MOUs," based on Verizon's subjective adjustment to an estimate from AT&T, and arriving at a total of $330-$440 million annual impact. This means that Verizon's calculation is not based on its own undocumented estimate of 2 billion minutes at all, but is totally dependent on its subjective adjustment to AT&T's undocumented estimate, which is itself a completely unsupported number that seems to have been plucked out of thin air, as well as Verizon's apparent estimate of impact of 3.3 - 4.4 cents per minute. In addition, Verizon (1) measures "impact" without adjusting for conference calls and other calls that would have taken place if all conference calling services imposed organizer fees and (2) ignores end user customer revenues received as the result of any additional calls. If Verizon actually believed that it was losing nearly $100,000,000 per year from "traffic pumping," it would have been required to report that fact in the Form 10-Ks it filed with the SEC. There is no mention of any such losses in Verizon's 10-K or the 10-K of any other carrier, as far as FreeConferenceCall.com is aware.

Second, TEOCO's analysis is also completely undocumented. It offers purported precision to nine significant figures (e.g., expense to wireless carriers for 2010 is stated to be $214,295,354 and expense to wireline carriers for 2010 is stated to be $209,392,785) without providing any information at all about how it derived such incredible precision. It references the use of "proprietary algorithms to monitor calls on a near real time basis using our SONAR technology," making it sound as if the study is highly scientific, but discloses nothing at all about its methodology. It does not disclose a single assumption or data point. For all the reader knows, TEOCO's "proprietary algorithms" methodology might be predicated in large part on which horse won the 7th race at the Santa Anita racetrack the day that TEOCO ran the study. Before the FCC makes policy on the basis of a purported calculation, it should at least require what any math teacher would: that the proponent "show its work." There is, of course, no reason to believe that TEOCO accounted for conference calls or other calls that would have taken place even if no conference calling services without organizer fees existed or revenues received as the result of any additional calls.

Finally, the Connectiv Solutions projection is also deficient in that it (1) measures "impact" without adjusting for conference calls or other calls that would have taken place even if no conference calling services without organizer fees existed; (2) ignores revenues received as the result of any additional calls, cavalierly stating that "The Wireless Service Provider cannot pass the variable usage fees to its end users due to commonly used unlimited domestic long distance plans," without any effort to ascertain what percentage of the wireless callers actually have unlimited domestic long distance plans or what percentage generated increased revenue for its wireless provider by upgrading to such plans in whole or in part so as to be able to call in to the conference bridges and other services in the OCNs in the study; (3) assumes that all calls to the 25 selected OCNs were the result of "access stimulation," including calls that may have been placed to conference bridges operated by IXCs themselves; and (4) appears to include as "expenses" the payments that wireless carriers make to IXC for the services that IXCs perform, despite the fact that this is merely a transfer payment (often to an affiliate) from one of the complaining groups (wireless carriers) to another of the complaining groups (IXCs).[38]

E. IXCs and wireless carriers can avoid any claimed harm from access stimulation

Conference calling services without an organizer fee are clearly desired by consumers. As the FCC recognized in its June 28, 2007 Declaratory Ruling and Order in Docket 07-135, when IXCs started blocking these calls, consumers complained, proving that consumers want these services.[39] The Commission acknowledged that there were numerous consumer complaints.

Although their customers pay to be connected, the IXCs and wireless carriers accept their money, but continue to restrict the consumer's ability to call. For example, attached as Exhibit C

[38] Moreover, the study draws the conclusion that something is amiss because the OCNs subject to access stimulation have longer than average hold times. To the contrary, conference calls typically have longer than average hold times, so it is not surprising that OCNs that have a larger than normal percentage of conference calls will have a larger than average hold time.

[39] *Declaratory Ruling and* Order, WC Docket 07-135 (June 28, 2007), 22 FCC Rcd 11629 at ¶ 1 & n. 2; *see ex parte* letter of Connie Kittson, National Sales Director, Mary Kay Cosmetics, WC Docket 07-135 (October 20, 2010) ("providers stopped blocking calls" to free conferencing services " because we, the consumers, had the power to simply switch to providers that did not block"); *see ex parte* letter of Dave Butts, Founder, Harvest Prayer Ministries, WC Docket No. 07-135 (October 12, 2010) at 1 ("in 2006, some telephone providers started blocking our conference calls so we started using providers that did not block calls").

is a letter from AT&T to an AT&T subscriber pointing out that under the terms of AT&T's unlimited rate plan, "[un]limited voice services are provided primarily for live dialog between two individuals. If your usage of unlimited voice services for conference calling or domestic all forwarding exceeds 750 minutes per month, AT&T may, at its option, terminate your service or change your plan to one with no unlimited usage components." AT&T further informed the customer that it would terminate service in 60 days if it did not stop using more than 750 unlimited minutes per month for conference calling or domestic all forwarding.

Another approach was taken by Telus, as reflected in Exhibit D. Telus notified its customers that calls to the 712 (Western Iowa) and 218 (Northern Minnesota) area codes would be subject to a 20 cents per minute charge, even for customers on unlimited plans.

Yet another approach is taken by Sprint, which offers a wireless plan that charges $69.95 for unlimited cell-to-cell and 450 minutes of cell-to-landline, and 45 cents per minute for every minute over 450, thus providing the customer with some of the benefits of an unlimited plan, while at the same time protecting Sprint against large costs for the customers making large volumes of calls to conference bridges or other attractive services [40] Further, as shown above, wireless carriers typically offer many tiers of calling plans, with those who use additional minutes because they call into conference bridges either required to pay by the minute or to move up to a more costly plan.

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[40] *See* **http://shop2.sprint.com/NASApp/onlinestore/en/Action/SubmitRegionAction?isUpgradePathForCoverage=false&currZipCode=&upgradeOption=&nextPage=DisplayPlans&equipmentSKUurlPart=%3FcurrentPage%3DratePlanPage&filterStringParamName=filterString%3DIndividual_Plans_Filter&newZipCode=90803** **(Last accessed March 22, 2011)**

VI. REVENUE SHARING SHOULD NOT BE PROHIBITED AND SHOULD NOT BE USED AS THE SOLE TRIGGER

The NPRM discusses a number of proposals that would attach consequences to the mere fact that a carrier is engaging in "revenue sharing." These consequences range from an outright prohibition on revenue sharing to required refiling of tariffs.[41] It is FreeConferenceCall.com's position that revenue sharing is an economically well-founded business technique that should not lead to drastic consequences, such as a *per se* prohibition of revenue sharing or a prohibition on collection of access revenues. Nevertheless, where anticipated low access volumes that are associated with high access rates are actually increased by access stimulation associated with revenue sharing, the result is likely to be a reduction in average costs. This creates a pricing problem, for which there is a reasonable basis for the Commission to require a pricing solution. Such action should take into account the fact that vertically integrated companies are able to share revenues within the corporate family without making actual payments, and should avoid discrimination in favor of vertically integrated companies. .

A. Revenue sharing should not be prohibited *per se*, nor should it disentitle the LEC from collecting access charges

While not proposing them, the NPRM discusses two closely related options. One would prohibit revenue sharing altogether, while the other would permit it, but deny carriers the right to share access charges on traffic for which they engage in revenue sharing. Both options should be rejected. In addition, as discussed further below, the use of revenue sharing as a trigger is imperfect, because it discriminates in favor of vertically integrated companies, such as AT&T and Verizon, in which the conference calling provider and the LEC collecting access charges are

[41] Loss of deemed lawful status, which is also proposed, is discussed in Section VIII, below.

part of the same overall enterprise, and because revenue sharing is not necessarily associated with cost reductions that make the tariffed access rate unreasonably high. As a result, any consequences that flow from revenue sharing must take these imperfections into account.

1. Revenue sharing is a common practice in the industry and is responsible for creating new companies, new technologies, innovative services, and pricing models—all of which benefit the consumer.

a. The FCC approved revenue sharing in the *CLEC Access Charge Reconsideration Order*

In the CLEC Access Charge proceeding, the FCC addressed claims by AT&T that certain competitive LECs were abusing the access charge system by seeking out customers that generate high volumes of 8YY traffic and sharing access revenues with these customers through agreements that provide for payments to the end-user based on the level of toll-free 8YY traffic generated by the customer.[42] Based on these arrangements and claims that they generated widespread fraud, AT&T requested that the Commission immediately cap the access rates charged by CLECs at the competing ILEC rate for this type of traffic with revenue sharing arrangements.

The FCC rejected AT&T's request and in so doing specifically noted that the existence of revenue sharing agreements does not in itself affect the level of traffic that is generated. Rather, the FCC found that commission payments from CLECs to generators of toll-free traffic, such as universities and hotels, do not create any incentives for the individuals who use those facilities to place excessive or fraudulent calls because the payments are being made to the hotel or university itself, and not the students or hotel guests who place the bulk of the toll-free calls. Rather, the "primary effect of commission payments appears to be to create a financial incentive for the institutions to switch from the incumbent to a competitive service provider."[43]

[42] *Access Charge Reform*, Eighth Report and Order and Fifth Order on Reconsideration, 19 FCC Rcd 9108, ¶¶ 64-72 (2004) (hereinafter, "*CLEC Access Charge Reconsideration Order*").

[43] *Id*. at ¶ 70.

Users of conference calling services without organizer fees, just like the students or hotel guests discussed in the CLEC *Access Charge Reconsideration Order*, have no incentive to place excessive or fraudulent calls or otherwise to stimulate the traffic. Rather, most conference calling users are using the service for business related purposes and have no reason to make more conference calls than necessary for their business purposes or to stay on the conference call any longer that necessary, and have no incentive to increase the number of minutes that they use. In any event, neither the conference bridge provider not the terminating LEC has any control over the customer's decision whether to place a conference call or how long it lasts. Moreover, the primary effect of revenue sharing arrangements in the conference calling industry is to determine which provider is used. Revenue sharing, by enabling the conference provider to eliminate its organizer fee, encourages users to switch from the long established IXC conference calling providers to new entrants, like Free ConferenceCall.com. This is no different from the incentives that the FCC approved in the *CLEC Access Charge Reconsideration Order*, which encouraged the hotels and universities to switch their services from incumbents to competitive providers.

Accordingly, since the FCC's goal is to eliminate arbitrage that is based upon the generation of elevated traffic volumes,[44] and the FCC already has found that the mere existence of a revenue sharing agreement does not in itself creative incentives for the calling parties to generate elevated traffic volumes, the FCC's revenue sharing trigger proposal should not be used by itself. A revenue share trigger in and of itself would have unintended effects on LECs that do not stimulate access, requiring them to lower their rates without any increase in volume that reduce their average costs of providing access

b. The FCC approved similar revenue sharing commissions in payphone and multi-party service cases

[44] NPRM, ¶ 6

Carriers, including ILECs and major IXCs, have been engaged in revenue sharing with respect to similar arrangements for decades. For example, the FCC found, with respect to private payphone commissions, that "it is not unlawful per se" for a carrier to pay commissions to aggregators "to compensate them for their costs" in making a service available to an end user, noting that "payment of commissions to [private payphone companies] does not reduce the tariffed rate paid to the carrier by the customer."[45] Similarly, LECs' sharing with conference call providers of access charges received from IXCs does not constitute an unlawful rebate of the access charges, since the payment of a portion of access revenues is not made to the party paying for the access service. That party is the IXC, not the conference call provider.

2. Revenue sharing is widespread throughout the business economy, and is economically sound

In our capitalist economy, revenue sharing is widely used in a wide variety of business relationships in which two entities combine their efforts to generate a single revenue stream. The following examples of such revenue sharing were listed in an ex parte letter in Docket 07-135, along with a listing of economic articles endorsing revenue sharing from a public welfare benefit perspective:

Royalties paid by book publishers to authors.
Royalties paid by recording companies to artists and composers.
Royalties paid by oil drillers to landowners.
Royalties paid by patent licensees to patent licensors.
Commissions paid to brokers and auctioneers.
Sports leagues sharing of gate, television, and concession revenue among teams.
Shopping center tenants sharing of revenue with lessors in the form of percentage rents.
Movie exhibitors sharing of receipts with movie distributors.
Movie producers sharing of revenues with actors, directors, screenwriters.

[45] *AT&T's Private Payphone Commission Plan*, 7 FCC Rcd 7135 (Nov. 4, 1992) at ¶¶ 8, 10. The FCC also approved of a LEC's revenue sharing with a chat line provider in *AT&T Corp. v. Jefferson Telephone Co.* 16 FCC Rcd. 16,130 (Aug. 31, 2001).

Airports sharing of revenues from parking and concessions with airlines.
Mutual fund providers sharing of fees with administrators of retirement plans.
Video rental stores sharing of rental receipts with movie distributors.
Online advertisers sharing of revenues with online content providers.
Online search engine sharing of advertising revenues with consumers.[46]

3. Revenue sharing should not be prohibited *per se*

As noted in ¶ 661 of the NPRM, the proposal would not call for a *per se* prohibition on revenue sharing. FreeConferenceCall.com agrees that revenue sharing should not be prohibited *per se* because of the benefits revenue sharing provides, as discussed above. In addition, while revenue sharing may in some circumstances be associated with an increase in volume that reduces a LEC's average cost per minute, that is not necessarily the case. To the extent that access stimulation creates a problem that requires a revision in the Commission's rules, it is clear that the problem stems from an increase in volume of access minutes resulting in a decrease in the average cost per minute below the authorized rate, as the authorized rate was based on a lower volume of minutes, whether the LEC is a rural ILEC[47] or a rural CLEC.[48] This has been the focus of the criticisms of access stimulation lodged by the IXCs.[49] Put simply, a pricing problem requires a pricing solution.

In addition, as the Commission recognizes in ¶ 670 of the NPRM, a LEC, rather than engaging in revenue sharing with a third party, may "engage[] in access stimulation activity on an integrated basis." If revenue sharing is to be prohibited, then access stimulation activity on an

[46] Attachment B to ex parte letter of Robert W. McCausland, WC Dockets Nos. 07-135 and 01-91 (October 20, 2010).

[47] *See* NPRM ¶ 648.

[48] *See* NPRM ¶ 650.

[49] *E.g.*, Comments of Verizon in Response to Proposed Rulemaking, WC Docket No. 07-135 (December 17, 2007) at 11-12; Reply Comments of Qwest Communications International Inc., WC Docket No. 07-135 (January 16, 2008) at 10-12

integrated basis must also be prohibited because the impact on purchasers of access service and their customers is the same. Unlike FreeConferencecall.com and the LECs to which its conference calls are homed, vertically integrated companies, such as AT&T and Verizon, are able to capture and share revenues without making payments. The Commission should not treat the same activity differently based on the corporate structure of the actor. But identifying "access stimulation on an integrated basis" is impossible, particularly using the proposed trigger, which does not look at access stimulation at all.

Even if the Commission were to try to change the trigger to focus not on revenue sharing but on efforts to increase access traffic, it would be impossible to draw a workable line. For example, if toll conference calling without an organizer fee were deemed to be "access stimulation," would the Commission also treat toll conference calling at the current AT&T and Verizon rate levels for organizer fees as access stimulation? If not, how would it treat toll conference calling with an organizer fee at one-half the current AT&T and Verizon level? How would it treat toll conference calling with an organizer fee of one cent per minute? Two cents per minute? And if an organizer fee were charged, it would not address terminating access—it would simply yield more revenue for the conference call provider. It should quickly become obvious that drawing a line between services that are "access stimulating" and those that are not is unworkable. Instead, the focus should be on ensuring that increases in traffic volumes that significantly reduce average cost are accompanied by appropriate price reductions. Again, the FCC's concern about pricing should be resolved with a pricing solution.

The IXC arms of AT&T and Verizon offer toll conference calling and home these calls to their LEC affiliates. For example, a Powerpoint presentation that FreeConferenceCall.com made to the FCC Staff on January 28, 2011 reflects telephone numbers that

FreeConferenceCall.com employees were assigned in January 2011 when signing up with AT&T and Verizon Business for conference calling. Not surprisingly, an investigation by FreeConferenceCall.com disclosed that the AT&T telephone numbers were assigned to TCG, an AT&T CLEC affiliate, while the Verizon Business telephone number was assigned to MCImetro ATS, Inc., a Verizon CLEC affiliate.[50]

Although these LEC affiliates of the conference providers receive the access revenues from the conference calls, the arrangement would not trigger the proposed rules because proposed rule § 61.3(aaa) defines "access revenue sharing" as requiring an "agreement that will result to a net payment to the other party." The RBOC LEC affiliates, such as TCG and MCImetro, that capture access revenue do not need to enter into an "agreement that will result in a net payment to the other party" with their IXC affiliates that offer conference bridges because both the IXC and the LEC are wholly owned subsidiaries of the same parent corporation. The access revenues all go into the same shareholder pocket whether they are kept by the LEC or "shared" with the IXC.[51]

It is vital to treat the vertically integrated businesses that share revenue behind the corporate veil the same as those that are not vertically integrated and therefore must share access revenues with outside companies. The Commission should not differentiate among carriers based on their corporate structure, size, and the corresponding distribution of revenue. Notably,

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[50] . *See* Attachment to *ex parte* letter of Jeff Holoubek Director of Legal & Finance, Free Conferencing Corp., WC Docket Nos. 7-135 and 01-92 (January 31, 2011), at pp. 8-10.

[51] While the Commission asks in ¶ 659 of the NPRM whether the prohibition on cross-subsidization in § 254(k) would "address a revenue sharing arrangement within the same company where an explicit revenue sharing agreement may not exist," § 254(k) would certainly not apply to the RBOCs. For § 254(k) to apply to an RBOC IXC offer of a conference bridge generating access revenue captured by its LEC affiliate, assuming no internal transfer of funds, the IXC conference calling services would have to be non-competitive, which is clearly not the case.

the loudest and most persistent complaints have come from the IXCs, who are losing toll conferencing minutes to FreeConferenceCall.com and others that provide toll conferencing services without imposing an organizer fee. Those same parties would receive the largest benefits from regulations that saddle their competitors with burdens from which they are exempt. Since the RBOCs all own LECs and therefore have no need to share revenue between the LEC that receives the access revenue and the conference call provider, the RBOCs can stimulate access calling all they want and reap the rewards without ever meeting the trigger. By contrast, providers of conference calling services that do not have a LEC as a parent, subsidiary or sister company meet the trigger if they share revenue whether or not they actually stimulate a single additional minute of calling.

The Commission's proposed trigger is thus both discriminatory in favor of vertically integrated companies and does not focus on the supposed problem—stimulation of additional minutes. Indeed, it is ironic that the Commission expressed concern in ¶ 668 of the NPRM that minutes-based triggers "may be over-inclusive and capture LECs not engaging in access stimulation," yet the Commission's proposal focuses exclusively on revenue sharing to the point that on its face it would capture LECs that do not stimulate a single minute of additional access traffic. Thus, a stand-alone revenue sharing trigger would overreach because it would damage companies that share revenue but do not stimulate access. Moreover, this model would require intense regulation, collection of detailed information and heavy-handed enforcement. IXCs would withhold payment of access charges based on suspicion that a LEC was engaging in revenue sharing. Litigation and administrative proceedings at the FCC would ensue, and the Commission's goal of reducing litigation and regulatory burdens would not be achieved. Ultimately a ban would create an atmosphere in which companies would look for ways other than revenue sharing, such as vertical integration, to produce the same result.

4. The Commission should not deny LECs the right to charge switched access on calls to those with which they share revenues

The Commission also asks in ¶ 669 of the NPRM whether it should adopt the approach, taken by the Iowa Utilities Board and closely related to a prohibition on revenue sharing, of simply prohibiting LECs from charging switched access for traffic delivered to the LEC's "business partner." For the reasons discussed above, such an approach is totally inappropriate, regardless of the definition of "business partner," as long as the definition encompasses some form of revenue sharing. The Commission already decided in the CLEC *Access Charge Reconsideration Order* and the AT&T private payphone matter that revenue sharing should not result in denial of access revenues. There is no new reason to overturn those determinations. Instead, if revenue sharing is believed to lead to an increase in volume, which in turn leads to a reduction in the costs of providing access, the most reasonable approach is to require a reduction in access rates commensurate with the increase in traffic.

5. Imposing rates that are lower than BOC rates would be unreasonable.

Sprint has suggested in recent ex partes that at most, the intercarrier compensation that a carrier should receive for what it referred to as "pumped" traffic is the $0.0007 per MOU rate that the FCC specified for ISP-bound traffic.[52] The Commission should reject Sprint's proposed approach. Under the Commission's rules, this traffic is access traffic, not local traffic.[53] While it is true that increased traffic volumes lead to decreased costs, particularly in rural areas where

[52] Ex parte letters of Charles W. McKee in WC Docket No. 10-90, GN Docket No. 09-51, WC Docket No. 07-135, WC Docket No. 05-337, CC Docket No. 01-92, CC Docket No. 96-45, WC Docket No. 03-109 (March 2, 2011).
[53] 47 C.F.R. §§ 69.2(b), 69.5(b).

access rates are often in excess of 4 cents, there is no basis for the Commission to conclude that revenue sharing LECs' costs of providing switched access are lower than BOC costs. For the FCC to require LECs to accept payments less than those that it deems just and reasonable for BOCs, while incurring equal or higher costs, would be discriminatory and would deny LECs equal protection under the Fifth Amendment.

6. Requiring CLECs that engage in revenue sharing to conform to the requirements of § 61.38 would impose unwarranted burdens

For similar reasons, the proposal for § 61.38 treatment of CLECs, as suggested by ¶ 665 of the NPRM, is unnecessary, unduly burdensome, and inadvisable. The FCC already found in the CLEC Access Charge proceeding that benchmarking CLEC access charges to those of the competing ILEC was reasonable, "will address persistent concern over the reasonableness of CLEC access charges and will provide critical stability for both the long distance and exchange access markets."[54] The Commission based this finding on the rationale that:

> a benchmark provides a bright line rule that permits a simple determination of whether a CLEC's access rates are just and reasonable. Such a bright line approach is particularly desirable given the current legal and practical difficulties involved with comparing CLEC rates to any objective standard of "reasonableness." Historically, ILEC access charges have been the product of an extensive regulatory process by which an incumbent's costs are subject to detailed accounting requirements, divided into regulated and non-regulated portions, and separated between the interstate and intrastate jurisdictions. Once the regulated, interstate portion of an ILEC's costs is identified, our access charge rules specify in detail the rate structure under which an incumbent may recover those costs. This process has yielded presumptively just and reasonable access rates for ILECs. Recently, the Commission has attempted to move away from such extensive regulation of ILECs. . . . *Given our attempts to reduce the regulatory burden on ILECs, we are especially reluctant to impose similar legacy regulation on new competitive carriers*.[55]

[54] Seventh Report & Order and Further Notice of Proposed Rulemaking, CC Docket 96-262 (April 27, 2001).

[55] *Id.* at ¶ 41 (emphasis added0.

While FreeConferenceCall.com does not endorse altering this approach by benchmarking rural CLECs to RBOC rates, such a benchmarking approach would seem to eliminate any claim that the rates include unreasonable subsidies. Moreover, the Commission has wisely avoided subjecting CLECs to the "regulatory burden" of cost proceedings to determine cost-based access rates for the more than 15 years since the passage of the 1996 Act. This proceeding, in which the Commission is attempting to streamline and simplify the entirety of intercarrier compensation, is not the time to initiate what might be dozens of hotly contested cost proceedings that would burden not only the CLECs but also the Commission Staff.

B. If a revenue sharing trigger is used, reduction in rates should be predicated on high access traffic volumes

As shown above, revenue sharing may, but does not necessarily, result in an increase in traffic volumes that render the LEC's access rates unreasonable. Accordingly, since the FCC's goal is to eliminate arbitrage that is based upon the generation of elevated traffic volumes,[56] and the FCC already has found that the mere existence of a revenue sharing agreement does not in itself creative incentives for the calling parties to generate elevated traffic volumes, the FCC's revenue sharing trigger proposal should not be used by itself, without an approach that ties rate reductions to cost reductions resulting from increased traffic volumes, such as a High Volume Access Tariff (HVAT). A revenue share trigger in and of itself would have unintended effects on LECs that do not stimulate access, requiring them to lower their rates without any increase in volume that reduce their average costs of providing access**.** In many places in which CLECs have experienced increases in volumes, they are already charging access rates that mirror the

[56] NPRM, ¶ 6

BOCs' rates, and even after any increase in volumes, their volumes are still likely to be lower than BOC volumes, so there is no reason to require a further reduction in access rates. Where CLECs and RLECs that have rates above BOC rates in rural or tribal locations and have experienced increases in volume, the mismatch between costs and rates can be addressed by a pragmatic and fair pricing solution, such as a High Volume Access Tariff.

VII. HIGH VOLUME ACCESS TARIFF (HVAT) - A BETTER SOLUTION

Since, as discussed above, the FCC's concern relates to a mismatch between high rural or tribal access rates and increased access volumes that lead to decreased per unit access costs, *whether or not revenue sharing or access stimulation is taking place*, the logical solution is a tariff based on volume of access minutes. Such tariffs have been filed by a number of rural CLECs having high volumes of access traffic, including Tekstar Communications,[57] BlueGrass Telephone Co. d/b/a Kentucky Telephone Co.,[58] Northern Valley Telecom,[59] Comity Communications, LLC,[60] and Native American Telecom.[61]

These tariffs are designed to allow a rural LEC that wants to generate a high volume of traffic to go from a "Higher Cost/Lower Volume" rate to a "Lower Cost/Higher Volume" rate. A series of step-downs in rate eventually lowers the carrier to rates found in urban areas (the

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[57] *See* Protested Tariff Transmittal Action taken, WCB/Pricing File No. 10-09; DA 10-1917 (October 6, 2010) .

[58] *See* Protested Tariff Transmittal Action taken, WCB/Pricing File No. 10-10; DA 10-1970 (October 14, 2010)

[59] Northern Valley's tariff became effective July 23, 2010, over objections from many IXCs, without rejection or suspension by the Commission, but no notice was issued by the Bureau.

[60] *See* Protested Tariff Transmittal Action taken, WCB/Pricing File No. 10-11; DA 10-2186 (November 16, 2010) .

[61] *See* Protested Tariff Transmittal Action taken, WCB/Pricing File No. 10-12; DA 10-2258 (November 30, 2010) .

RBOC rate). This type of tariff has been proven to work in Minnesota. Indeed, in the cases of Tekstar, Kentucky Telephone, Comity Communications, Native American Telecom and Northern Valley Telecom, the Staff of the Wireline Competition Bureau allowed the tariff to go into effect on 15 days' notice over the protest of several IXCs and/or wireless carriers.[62] For example, Tekstar Communications, Inc. FCC Tariff No. 2 provides for a rate of 2.15 cents for the first 5 million minutes per month, and which point the rate drops to 1.4 cents. At 25 million minutes per month, the rate drops to .8 cents, and at 100 million minutes per month it drops to .55 cents, the RBOC rate.[63] This is illustrative. The Commission could adopt different rates and different breakpoints**.** This tariff approach can also be modified to incorporate time limits at each step so that volumes cannot be manipulated to retain specific rate bands.

This type of approach offers several benefits not provided by the approach proposed in the NPRM. It exempts a CLEC that chooses to use revenue sharing as a means of obtaining financing, provided that the access minutes do not exceed a specified level. This is beneficial because, as shown above, revenue sharing can be pro-competitive. As stated previously, the NPRM's proposed approach would impose sanctions on those engaging in revenue sharing, even if the revenue sharing has no impact on access minutes.

This HVAT approach also incentivizes investment in infrastructure for rural carriers, helps to promote rural economic development and the ability of rural customers to access advanced telecommunications services, including broadband, but eventually levels the playing

[62] See notes 57-61 *supra*.

[63] IXCs make very resourceful use of least cost routing, so that when one IXCs reaches a lower access rate level on a high-volume tariff, the others can and will route their traffic through that IXC so as to minimize access charges.

field with urban areas, once volumes that are significantly higher than the volumes that justified the rural exemption are reached.

The HVAT approach is an alternative that can reduce the need for USF in high cost areas. Federal statutes and FCC regulations and statements have consistently and categorically concluded that the policy goal for rural America should encourage the deployment of the infrastructure necessary to support advanced telecommunications services.[64] In order to support that laudable and widely supported goal, the Commission has always held that access charges for originating and terminating long distance traffic in rural areas can be higher than the nationwide average.

Some rural communities are so poorly served by incumbent telephone service providers that they are forming their own CLECs because they cannot obtain adequate service from existing IXCs/ILECs. Free conferencing companies, as well as companies offering voicemail, domestic domestic all forwarding, and other non-geographic services, have been the necessary catalyst for these rural LECs to develop employee skills, re-invest capital in operations, and provide more and better service to local customers, as discussed further below. By contrast, larger LECs such as Verizon, have been abandoning rural areas, having sold off their properties in Maine, New Hampshire, Vermont, West Virginia, and the former GTE rural properties in numerous states.

Farmers Telephone Company, of Riceville, Iowa ("Omnitel") is an example of a LEC that sold local exchange services to a free conferencing company from 2005 until 2007. Because

[64] *See, e.g.*, American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, § 6001(k)(2)(D), 123 Stat. 115, 516 (Directing the Commission to create the National Broadband Plan "to ensure that all people of the United states of access to broadband capability"); 47 U.S.C. Sec. 1302(a) (directing the Commission and other regulatory agencies to encourage the deployment of advanced services).

of changing consumer preferences and a small rural service territory, Omnitel did not have much of a future before working with a free conferencing operation. Today, Omnitel is able to offer its rural customers a wide array of services, including high-speed broadband, toll-free numbers, a variety of long-distance plans, teleconferencing, cable TV, wireless and more. Similar outcomes are possible for other rural LECs and are completely consistent with the FCC's vision for vibrant competition in rural America.

As the Commission recently acknowledged in its *Notice of Inquiry in the Matter of Improving Communications Services for Native Nations*,[65] perhaps the least served communities in the nation are those on Native American Reservations. These reservations are located in some of the poorest and most remote regions. Until now, business models that respected the tribe's autonomy, while effectively providing those who reside in these remote areas with modern telecommunications and Internet service, have been elusive. The result, as Commissioner Copps noted at the Commission's March 2011 meeting (at which the Commission unanimously passed three items aimed at improving communications services for Native Americans), is a level of broadband access on American Indian reservations that is "a national disgrace."[66]

As the Commission observed in issuing this *Notice of Inquiry*:

> According to the most recent comprehensive data, only 67.9 percent of households on Tribal lands have basic telephone service, compared to the national average of approximately 98 percent. Moreover, while there is no solid data on broadband deployment on Tribal lands, availability is estimated at less than ten percent. The lack of robust communications services presents serious impediments to Native Nations' efforts to

[65] CG Docket 11-41 (March 4, 2011)

[66] FCC highlights 'national disgrace': Connectivity gap for Native Americans (available at: http://thehill.com/blogs/hillicon-valley/technology/147277-fcc-promotes-communications-on-tribal-lands?utm_source=feedburner&utm_medium=email&utm_campaign=Feed%3A+OTInews+%28OTI+News%29 (last accessed March 18, 2011).

> preserve their cultures and build their internal structures for self-governance, economic opportunity, health, education, public safety, and welfare – in short, to secure a brighter future for their people.
>
> . . . The lack of communications services leads to a departure of bright and energetic youth wishing to contribute to their communities, and makes it difficult to attract talented managers with valuable business development experience. Nevertheless, where Native Nations and their community members do have access to broadband, studies indicate that their rates of Internet use are on par with, if not higher than, national averages.[67]

The Commission further observed that because "Native Nations uniquely know their members and communities[,]Tribal- or Native-centric business models . . . have a greater chance of achieving successful and sustainable services on their tribal lands."[68]

Free conferencing services, along with voicemail, domestic domestic all forwarding, and other non-geographic services, are already helping to establish tribal-centric business models. Native American tribes are discovering that they can establish their own telephone companies and sell local exchange service to various providers and applications to the Federal Government. In doing so, Native American tribes can finance their own infrastructure build-out and provide computer labs with Internet access, telecommunications and broadband services to every Reservation resident, subsidized by tribe-owned businesses and not by the United States Government. They have discovered that their ability to operate viable telecommunications businesses gives them the opportunity for economic growth and independence.

By way of example, as reflected in the November 8, 2010 *ex parte* of Peter Lengkeek, Tribal Council member for the Crow Creek Tribe, in WC Docket No. 07-135, the Crow Creek Indian Reservation in Fort Thompson, South Dakota, is one of the most poverty stricken places

[67] *Notice of Inquiry In the Matter of Improving Communications Services for Native Nations*, CG Docket 11-41 (March 4, 2011), at ¶¶ 1, 2.

[68] *Id*. at ¶ 2.

in the United States. It has been able to build a tribe-owned telephone company, Native American Telecom – Crow Creek, a computer lab with Internet access, and communications center due, in part, to funds derived from high volume access services. The telephone company now provides high speed broadband and telephone to over 110 homes and businesses and has created new jobs for Native Americans. The Tribe now has an impetus for economic expansion and personal pride. Jobs are being created, and a source of income for the Tribe has been established that will be used for further economic growth and the general welfare of their people. This solution is independent of USF or federal funding. Without the ability to provide access service to other companies and realize the revenues, the tribe-owned telephone company business model would not be viable. This communications and economic success story was possible because of the ability to attract high volume access traffic to develop the capital investment necessary to build out the infrastructure. To be clear, once call volumes grew, Native American Telecom filed an HVAT, allowing its rates to taper down to the RBOC rate as access volumes grew.

This business model is now being adopted in other remote locations such as the Pine Ridge Indian Reservation in South Dakota, and many others have shown interest. This example helps to highlight the fact that the application of the rural exemption for other rural locations can be a valuable stimulus to economic growth in rural areas, true to the FCC's intention. This trend is one that should be encouraged by the FCC, while at the same time addressing concerns about pricing.

Perhaps most significantly, the HVAT approach, if permitted to be filed as a streamlined tariff on 15 days notice, so as to be subject to the stability of the "deemed lawful" provisions of 47 U.S.C. § 204(a)(3), provides a rural LEC engaging in revenue sharing with an incentive to reduce its access rates. This is because the presence of a tariff that includes "deemed lawful" status provides the rural LEC with protection against IXC claims of unreasonable rates. By contrast, a rural LEC engaging in access stimulation that chooses not to file an HVAT runs the risk that IXCs will simply deny all CLEC access invoices and withhold payment, a practice they have engaged in for many years, knowing that LECs will have no choice but to capitulate and accept less than the lawful rate.[69] It is important for the Commission to provide LECs engaging in revenue sharing an incentive to adopt a rate that is volume sensitive and that will provide some protections for their revenue stream. Otherwise, the Commission and the industry will be saddled with efforts by LECs to "work around" the revenue sharing criteria, endless disputes over whether the LEC did or did not meet the revenue sharing criteria, self-help by IXCs, and the type of continued waste of resources that led the Commission to this effort to address access stimulation.

VIII. THE COMMISSION SHOULD NOT DENY THE BENEFITS OF "DEEMED LAWFUL" STATUS PURSUANT TO § 204(A)(3) TO LECS THAT COMPLY WITH THE COMMISSION'S ACCESS STIMULATION RULES

Section 204(a)(3) was added to the Communications Act by amendment in 1996, and altered the pre-1996 framework by deeming tariffs filed pursuant to the streamlined provision in§

204(a)(3) "lawful" unless suspended by the FCC within the applicable statutory period. In implementing this amendment in *In re Implementation of Section 402(b)(1)(A) of the Telecommunications Act of 1996* , 12 F.C.C.R. 2170, 2182-83 (1997) ("*Streamlined Tariff*

[69] *See ex parte* letter of Ross A. Buntrock, WC Docket 07-135 (December 10, 2010) at 1 (identifying IXCs that have "refused to pay Kentucky Telephone for both disputed and undisputed traffic").

Order"), the FCC analyzed the legal consequences of the term "deemed lawful." The FCC recognized that the unambiguous language of § 204(a)(3) meant that after the expiration of a 7 or 15 day period, the FCC could not order retroactive changes to the tariff but would only be able to do on a "prospective" basis. *Id*. at 2176 ¶ 8. More importantly, the FCC recognized that "this would differ radically from the current practice, where a rate that goes into effect without suspension and investigation is the 'legal' rate, leaving carriers liable" for retroactive damages "if the tariff is subsequently found unlawful." *Id*.

The difference between a "legal" rate, and a "lawful" rate is explained in Supreme Court precedent. As the FCC observed in the *Streamlined Tariff Order*, in *Arizona Grocery v. Atchison, T & S.F. Railway, Co.*, 284 U.S. 370 (1932), the Supreme Court held "that a tariff rate that is allowed to become effective is considered the 'legal' rate, that is the rate that the carrier is required to collect and the customer to pay under the filed rate doctrine. The lawfulness of an effective rate, however, remains subject to challenge" under the Communications Act. *Streamlined Tariff Order*, 12 F.C.C.R. at 2177 ¶ 11. As the D.C. Circuit explained, "a rate's legality is not enough to establish its substantive reasonableness or 'lawfulness.'" *ACS of Anchorage, Inc. v. FCC*, 290 F.3d 403, 411 (D.C. Cir. 2002) ("*ACS*"), *citing Arizona Grocery*, 284 U.S. at 384. Thus, a "carrier charging a merely *legal* rate may be subject to refund liability if customers can later show that the rate was unreasonable." *Id*. emphasis in original). Should the FCC "declare a rate to be *lawful*, … refunds are thereafter impermissible as a form of retroactive ratemaking." *Id*., *citing Arizona Grocery*, 284 U.S. at 387-389 (emphasis in *ACS*). The FCC explained that if, after completing a proceeding evaluating the legal rate, the FCC finds some element of the tariff to be unlawful it may, in contrast, require the carrier to pay damages for the period during which the tariff was in effect. *Streamlined Tariff Order*, 12 F.C.C.R. at

2176 ¶ 8. The FCC accordingly concluded that "a streamlined tariff that takes effect without prior suspension or investigation is conclusively presumed to be reasonable and, thus, a lawful tariff during the period that the tariff remains in effect." *Streamlined Tariff Order*, 12 F.C.C.R. at 2182 ¶ 19. The policy reasoning for this change continues to be valid: providing stability and one set of rules to govern the marketplace.

The NPRM proposes in ¶ 666 and in proposed rule § 61.26(d)(2)(iv) to deny CLECs that engage in "access revenue sharing" the right to file streamlined tariffs under 47 U.S.C. § 204(a)(3) that will be "deemed lawful." This denial of the right to file streamlined tariffs would extend to LECs that engage in revenue sharing *even if their access rates are at or below BOC access rates.* If a BOC rate is "just and reasonable," a rate that parallels that rate should receive similar treatment—being deemed lawful. As applied to CLECs that offer access rates at or below BOC access rates, any other remedy is unnecessary and unwarranted. There is no need to punish a CLEC that has complied with all of the rules that the FCC has established to address access stimulation issues.

The rationale in ¶ 666 of the NPRM for requiring CLECs that meet the proposed access stimulation trigger to file on at least 16 days' notice, thereby eliminating such CLECs' rights to "deemed lawful" treatment, is based on flawed logic. The rationale set forth in the NPRM is that: "whether a LEC has met a proposed access stimulation trigger might not be readily apparent when the tariff is filed. As a result, the LEC could invoke the 'deemed lawful' protection to avoid refund liability, and effectively evade the operation of our proposed rules for at least a period of time, such as until a new tariff is filed."

The approach taken in the NPRM is illogical and overinclusive in that it treats CLECs that have *complied* with the Commission's rules by filing or refiling access tariffs at the rates of the RBOC as though they had violated the rules. If a CLEC files rates that match the RBOC rates, then it *does not matter whether or not the CLEC has met the access stimulation trigger*. Either way, the CLEC has complied with the Commission's rules and reduced its tariff rate, addressing the FCC's pricing concerns. The tariff should be accorded "deemed lawful" status because whether or not the CLEC has met the proposed access stimulation trigger, the rates comply with the Commission's rules. While it may not be readily apparent whether the CLEC has met the access trigger, it should be readily apparent whether the CLEC has matched the RBOC's access rates and thus the supposed difficulty of determining whether a CLEC has met the access trigger is a red herring.[70] Therefore, it should suffice to take away the benefits of "deemed lawful" treatment *only* from CLECs whose rates exceed the RBOC's rate and that meet the proposed access stimulation trigger.[71] If meeting the trigger leads to a requirement that a CLEC file an HVAT that is deemed lawful, the CLEC will have an incentive to do so, because it will retain deemed lawful status by filing an HVAT, while failure to file an HVAT would cause it to lose deemed lawful status, thereby providing an IXC with an incentive to engage in self-help refusal to pay. The filing of a deemed lawful HVAT will reduce the number of disputes and simplify enforcement. The only questions in the event of a dispute will be whether the tariff covered the service provided, whether the CLEC billed for the correct number of minutes and whether the CLEC correctly applied the declining tariffed rates. Questions about whether the rate was "just and reasonable" given the volume will have been resolved in advance.

[70] While, as discussed herein, FreeConferenceCall.com does not agree with the proposed access stimulation trigger, FreeConferenceCall.com does not object to the concept expressed in ¶ 666 of the NPRM that the tariff of a carrier that fails to re-file its tariff when required to do so by the FCC's rules should lose its "deemed lawful" status.

[71] While such an approach might be criticized on the grounds that it is not immediately apparent whether the CLEC has met the proposed access stimulation trigger, the same criticism applies equally to the proposal set forth in the NPRM.

The consequences that would result from the NPRM's proposal to revoke deemed lawful status of CLEC tariffs even where the CLEC has complied with the Commission's pricing rules are likely to be dire. Deemed lawful status is needed by CLECs to create a level of certainty in developing business plans, booking revenue and eliminating disputes. IXCs are notorious for engaging in self-help and not compensating LECs after receiving payment from their customers for the completed calls or engaging in litigation to weaken the LEC.[72] This type of self-help by IXCs constitutes arbitrage because it allows the IXC to collect revenues from its customer that cover the entire cost of service, including termination service provided by the terminating LEC, without actually paying the cost of termination.[73] Eliminating the deemed lawful provision for carriers who satisfy the revenue sharing trigger—even if they are charging RBOC rates—will result in continued litigation and self-help by IXCs because they could seek retroactive refunds, and because they have the leverage of engaging in arbitrage by refusing to pay RLECs and CLECs. It is this instability that harms the development of broadband and other investment in rural America as much as the pricing of terminating access. Regulatory and pricing clarity, a deemed lawful tariff, and enforcement by the FCC will provide the needed stability.

The Commission has noted in the past that IXC self-help refusals to pay CLEC access charges has been a problem. For example, in the Commission's *Seventh Report and Order*, the Commission expressly noted its concerns over the IXCs' repeated use of self-help by simply refusing to pay tariffed access charges:

> Reacting to what they perceive as excessive rate levels, the major

[72] *See ex parte* letter of Ross A. Buntrock, WC Docket 07-135 (December 10, 2010) at 1 (identifying IXCs that have "refused to pay Kentucky Telephone for both disputed and undisputed traffic").

[73] In NPRM ¶ 607, the Commission asked that parties identify other forms of arbitrage. Self-help by IXCs is one.

> IXCs have begun to try to force CLECs to reduce their rates. The IXCs' primary means of exerting pressure on CLEC access rates has been to refuse payment for the CLEC access services. Thus. Sprint has unilaterally recalculated and paid CLEC invoices for tariffed access charges based on what it believes constitutes a just and reasonable rate. AT&T, on the other hand, has frequently declined altogether to pay CLEC access invoices that it views as unreasonable. We see these developments as problematic for a variety of reasons. We are concerned that the IXCs appear routinely to be flouting their obligations under the tariff system. Additionally, the IXCs' attempt to bring pressure to bear on CLECs has resulted in litigation both before the Commission and in the courts. And finally, the uncertainty of litigation has created substantial financial uncertainty for parties on both sides of the dispute.[74]

That was 10 years ago, and the problem of self-help refusal by IXCs to pay CLEC access charges is worse today, as reflected in the proliferation of litigation over ongoing IXC self-help refusals to pay.[75]

FreeConferenceCall.com submits that the solution is not elimination of deemed lawful status for CLEC tariffs, but rather a tariff that will be deemed lawful because it reduces access charges as volume increases, reaching the BOC level when volumes reach BOC levels. This drop in tariffed rates, repeated wherever higher volumes exist, would lower the overall average tariffed rate in rural America. If a CLEC that is carrying BOC volumes is charging the BOC rate, it is not appropriate to eliminate the deemed lawful status, because the Commission has recognized that access stimulation is not a problem when BOC rates are being charged. Eliminating deemed lawful status for carriers that are charging BOC rates and share revenue is

[74] In re Access Charge Reform, Seventh Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Red. 9923. 9932, ¶ 23 (Apr. 27, 2001) (citations omitted).

[75] *See All-American Telephone co., et al. v. AT&T Corp.*, FCC11-5, File No. EB-10-MD-003 (January 20, 2011). *See also* Commissioner Copps' Statement upon issuance of the NPRM, decrying excessive litigation, self-help and use of market power over intercarrier compensation disputes.

anticompetitive and discriminates in favor of the BOCs, which can accomplish the same result behind the corporate veil without "sharing revenue."

CONCLUSION

For the reasons set forth above, FreeConferenceCall.com believes that special rules to address access stimulation are not needed, but if such rules are needed, the high volume access tariff discussed in Section VI, above is the remedy that best balances public interest considerations. Because it would be discriminatory to define revenue sharing in such a way that it includes independent conference call providers but excludes those that share revenue within a corporate enterprise, and impractical to define it to include revenue sharing within a corporate enterprise, revenue sharing should not be a trigger by itself. Rather, if a trigger is needed, it should also be based on volume that reduces costs and thereby justifies a lower rate. The HVAT proposed herein would do just that, by providing a step-down of rural rates based on increased volume. Such an approach is easy for IXCs to enforce, as they will know when the price points at which lower rates set in are reached simply by comparing the minutes billed on their invoices with the LEC's filed tariff. Whatever solution the FCC adopts, it should make clear that if the LEC complies with the FCC's rules, self-help withholding of payment by IXCs is not permitted; if they object to the charges, they must pay and dispute. In addition, the FCC should make clear that any rules that it adopts constitute a change from currently applicable law, and therefore, they should apply only prospectively, to avoid manifest injustice.

ADDENDUM

FreeConferenceCall.com has made it its mission to redefine one-to-many communications by providing quality, innovation, excellent customer service and the best pricing available. FreeConferenceCall.com's services are designed to meet practically any customer's teleconferencing needs, at prices that are geared toward every tier of use.

FreeConferenceCall.com provides services for regional/national sales meetings, new product training/launches, multi-vendor conferences, project management team meetings, cross functional/divisional meetings, crisis response meetings, teaching/educational seminars, motivational seminars, school groups/organization meetings, sports teams meetings, family reunions, religious/bible study groups, multi-national sales meetings, investor relations calls, shareholder meetings, company announcements, quarterly results, annual sales meetings, political speaking engagements, promotional events, client/customer calls, and remote musician recordings. FreeConferenceCall.com also allows for recording of calls for distribution, archiving and sending via RSS and Podcast. FreeConferenceCall.com’s customers include nonprofits, large and small businesses, political campaigns, families, church and prayer groups, and other organizations. In addition, representatives of more than 100 Fortune 500 companies currently use FreeConferenceCall.com. FreeConferenceCall.com’s services help these groups save time, money and reduce their impact on the environment.

The Kidney Cancer Association (“KCA”) is among the many charities that use FreeConferenceCall.com's services. KCA selected FreeConferenceCall.com as its primary conferencing service of record to its entire network of patients, doctors and board members. Headquartered in Chicago, KCA consists of 30,000 people throughout North America, the

European Union and 100 nations globally. Prior to selecting FreeConferenceCall.com, KCA consumed approximately 2,000 to 8,000 minutes per month through an array of paid conferencing services that were causing a monetary drain on the nonprofit organization. The small charity required a cost-effective conferencing service which led KCA to select FreeConferenceCall.com as its primary conferencing provider in 2005. Since then, KCA has saved thousands of dollars annually making roughly the same calls - money that it applies to its core mission of education outreach, direct mail and funding of research related to kidney cancer.[76]

Some of FreeConferenceCall.com's other notable users include Mary Kay Cosmetics, National Federation of the Blind, International Coach Academy, The Salvation Army, Herbalife, FedEx, Tupperware, and the Direct Selling Women's Alliance. Given the global economic situation, as well as the rising awareness regarding environmental issues, companies such as these have deemed corporate travel to be a generally undesirable option for business matters. The costs involved in sending a person or group to a remote office branch can be exorbitant while the accumulated carbon emissions of frequent travel can adversely affect the environment.

FreeConferenceCall.com's all-digital network is provided through its relationship with local exchange carriers ("LECs"). FreeConferenceCall.com has formed relationships with rural LECs and urban competitive local exchange carriers ("CLECs") that have excess network capacity for the high network demand occasioned by multiple, simultaneous conferences. FreeConferenceCall.com competes with the toll and toll-free conference calling services of large

[76] *See,* News Release, "FreeConferenceCall.com Serves as Critical Communications Conduit in the Battle Against Kidney Cancer," Free Conferencing Corporation of America (Aug. 13, 2007) *at* http://www.FreeConferenceCall.com/resources/pr081307.html.

telecommunications carriers (IXC's) which use their market power and access to their landline and wireless customers to charge organizer fees, per line fees, and monthly or annual fees costing consumers substantially more than a similar service from FreeConferenceCall.com.

Under these arrangements, FreeConferenceCall.com subscribes to a LEC's telecommunications services and FreeConferenceCall.com provides the teleconferencing bridges. The LECs, in turn, pay certain marketing fees to Free Conferencing based on the amount of conference call traffic that is sent to the telephone numbers the LECs have assigned to FreeConferenceCall.com.